VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at University Station, Charlottesville, Va.; BUSINESS communications to the PUBLISHERS.

RECENT legislation in Virginia appears to have altered the statutory rule, found in sec. 3260 of the Code, that pleas in abatement must be filed at the same rules with the declaration. The effect of this legislation is not perceptible at a glance, and many lawyers have doubtless overlooked it.

Sec. 3260 of the Code provides that no plea in abatement shall be received "after the defendant has demurred, pleaded in bar, or answered to the declaration or bill, nor after *a rule to plead*, or a conditional judgment or decree *nisi*." By Acts of 1897–8, p. 198, this section was amended by the omission of the "*rule to plead*." Hence there is no prohibition against filing a plea in abatement after a rule to plead. Turning to sec. 3284, it will be observed that the defendant may appear at the rule day to which the process is returnable, and may prevent a conditional judgment or decree *nisi* from going against him, by merely entering his appearance, without pleading or answering. Under this section, the conditional judgment or decree *nisi* is proper only when the defendant *fails to appear* at the return day of the process. If he appears, but fails to plead, answer or demur, then, and only then, a rule is given him to plead at the next rules.

The result is this: If he fail to appear at the return-day of the writ (the declaration or bill being properly filed) a conditional judgment or decree *nisi* goes against him, and his right thereafter to plead in abatement ceases, as under sec. 3260 in its original form. But if he enter his appearance at the return-day of the writ, without more, he thereby prolongs his right to plead in abatement until the next rules. This must follow, since the rule to plead fixes the next rule-day as the time (sec. 3239), and if at the next rules he pleads (whether in abatement or in bar) he is not in default; and no office judgment or decree *pro confesso* can be taken against him, under sec. 3284, until he is in default.

The purpose of the amendment seems wise. It was evidently in-

tended to meet the case where counsel for plaintiff purposely defers the filing of his declaration until the last moment of the rules, so as to prevent the defendant from discovering a ground of abatement in time to file his dilatory plea. The practice is itself scarcely commendable.

REFERENCE was made in a previous number, to the effect of recent legislation in Virginia, touching the married woman and her estate (6 Va. Law Reg. 52). The conclusion reached was that her ancient disabilities have been removed, save in a few particulars, and that, for most purposes, she is *feme sole.* The new Married Woman's Act is found in Acts 1899–00, p. 1240.

Recurring to the subject, and dealing with it more in detail, the result seems to be somewhat as follows:

(1) *Her property rights.*—In the language of the statute, "all property of a married woman, heretofore or hereafter acquired," is secured to her, free from the control of her husband. This makes her complete mistress of her so-called "common law lands," as well as to property acquired under the Smith Act, or under the Code of 1887.

(2) *The contingent right of dower.*—The inchoate dower is an interest of a peculiar nature. It was held not to be within the comprehensive language of sec. 2284 of the Code, viz., "*all* real and personal estate to which any married woman . . . may be entitled . . . by gift, grant, purchase, descent, devise, bequest, *or in any other manner whatever.*" *Land* v. *Shipp,* 6 Va. Law Reg. 158. A broader phraseology could scarcely have been devised. The language of the later act (Acts 1899–00, p. 1240) is not so specific and certainly not broader, viz., "A married woman shall have the right to acquire, hold, use, control and dispose of *property* as if she were unmarried, and such power . . . shall apply to *all* property heretofore or hereafter acquired." If the inchoate dower was not property under the former, it is clearly not property under the later act.

This construction is borne out by Acts 1899–00, p. 291, giving the wife power, as a *feme sole,* to dispose of her contingent right of dower in lands "in which her husband has no interest"—that is, in lands which he has conveyed without her joinder—thus implying the absence of the power in any other case. This conclusion is further strengthened by the circumstance that sec. 2502 (amended by Acts 1889–90, p. 193), providing for the joinder of husband and wife in the conveyance

of her "*dower* . . . and all right, title and interest of every nature which . . . she may have in any estate conveyed or embraced" in such conveyance, was neither repealed nor altered by the recent legislation.

The probability is, therefore, that as to her contingent right of dower, the wife is still under the disabilities of coverture—with the single statutory exception mentioned. That is, she can only release, or contract to release, her contingent right of dower, by uniting with her husband, and the deed or writing does not become effectual until recorded. And it is probable that the right cannot be subjected to the payment of her debts.

(3) *Wife's equitable separate estate.*—It was doubtless the intention of the new statute to preserve the equitable separate estate, as it existed under the established principles of equity; but the language of the amendment leaves room for doubt on this point. Section 2294 of the Code preserved the equitable separate estate, *with all its incidents*, by declaring that nothing contained in the other sections should be construed as applicable to such estates, and that they should be held "according to the provisions of the respective settlements thereof, and shall be subject to and governed by *the rules and principles of equity applicable to such estates.*"

The amendment (Acts 1899–00, p. 1240) alters this language, and merely provides that nothing in the preceding sections shall be construed to "*prevent the creation*" of equitable separate estates, "and they shall be held according to the *provisions of the instrument* by which they are respectively created."

If the intention was not to alter the rules and principles of equity by which such estates are governed, the purpose of this change of language is not apparent. Equitable separate estates are frequently settled upon married women, without the expression of any powers or restrictions—and it is the custom of equity to regulate the wife's powers with respect thereto, according to its own well settled principles. Doubtless these same principles will be held applicable where there are no "provisions of the instrument" to indicate a contrary intention, notwithstanding the elimination of the statutory declaration that such estates shall be governed by equitable principles.

Whether an ordinary conveyance from husband to wife, which, in the absence of statute, and under the principles of equity, would have created an equitable separate estate in the wife (*Leake* v. *Benson*, 29 Gratt. 153; *Irvine* v. *Greever*, 32 Gratt. 411), would still have that

effect, or whether such a conveyance—containing no special provisions with respect to her powers, and nothing to indicate whether the grantor intended to create an equitable separate estate or not, and, therefore, not exhibiting the criterion of "intention," established in *Jones* v. *Jones*, 96 Va. 749—is an ordinary legal estate, must be left to future judicial construction. In a previous discussion (4 Va. Law Reg. 432) we concluded that under the Code an equitable separate estate would result from the mere fact that the husband was grantor. The language of the recent amendment, however, would indicate the contrary.

(4) *Property held under the Smith Act.*—The Married Woman's Act of 1899-00 (p. 1240), in terms declares that its provisions shall apply to "*all* property . . . *heretofore* or hereafter acquired"—except the equitable separate estate, as shown. It would seem, therefore, to include property acquired under the Smith Act. But doubt is cast upon this conclusion by the circumstance that sec. 2297 of the Code (specifically applicable to property acquired under the Smith Act) remains unaltered, and sec. 2298, likewise applicable to property of the same character, is amended by making *remedies* for and against the wife with respect to such property, the same as with respect to her other property, except that the remedy provided in the original Smith Act is preserved, by which the wife, where the husband refuses to unite, or is incompetent to unite, in a conveyance of such property, may file a bill to have absolute title conveyed.

The precise status of the wife with respect to property of this character, is not clear. Reading the Married Woman's Act of 1899–00 with sections 2297 and 2298, the latter as amended (*ubi sup.*), the result appears to be that she is a *feme sole* as to the *personal* property acquired under that act, but as to any contract directly affecting the *realty*, the joinder of the husband is necessary. See 4 Va. Law Reg. 433.

(5) *Wife's powers of contract.*—These are unlimited—save as qualified by what has been said with respect to contingent dower, the equitable separate estate, and real property held under the Smith Act. She has the same broad powers of contract as a *feme sole*—and her contracts bind her personally, whatsoever their nature, and *whensoever* made. Nor need she possess any estate as a basis of credit, as was held (*Hirth* v. *Hirth*, 5 Va. Law Reg. 774) to be necessary under the Code of 1887. She may contract with her husband as with a stranger—and contracts of partnership with the husband are not prohibited, as under former laws. The statute in terms declares that

she may be sued on her contracts in the same manner, and *with the same consequences*, as if unmarried, "whether the . . . liability asserted . . . against her shall have accrued *before* or *after* the passage of this act." The apparent intention here is to validate *all* contracts heretofore made by married women, in so far as they may have been inoperative, in whole or in part, by reason of coverture. Expressed otherwise, coverture is no longer a defense to any action on contract, with the unimportant exceptions noted in connection with the contingent right of dower, the equitable separate estate and real estate held under the Smith Act.

Question has been made whether legislation thus creating a legal liability where none existed before, is not unconstitutional. But its constitutionality would seem to be beyond question. *Watson* v. *Mercer*, 8 Pet. 88; *Randall* v. *Krieger*, 23 Wall. 137; note 19 L. R. A. 256.

(6) *Wife's power as to making a will.*—In this respect she is a *feme sole* as to all property — saving the husband's curtesy consummate, and such restrictions as the grantor of her equitable separate may prescribe in the instrument of grant (Acts 1899–00 p. 753).

(7) *Husband's interest in wife's property.*—The husband is deprived of all interest in the wife's property, save curtesy consummate in her real estate, where the common law requisites exist. Doubtless the statute does not intend to deprive him of any marital right, actually vested under former laws—since such an impairment of his rights would most likely be unconstitutional. *Wyatt* v. *Smith*, 25 W. Va. 813; *McNeer* v. *McNeer*, 142 Ill. 388, 19 L. R. A. 256 and note. He remains her sole distributee in case of intestacy. Secs. 2257, 2293, Acts 1899–00, p. 1240.

(8) *Husband's liability for wife's acts.*—The husband is exempt from responsibility for "any contract, liability, or tort of his wife," whether made or incurred before or after marriage. He probably remains liable for her support and maintenance, and bound for contracts which she makes as his agent, either on implied authority from him, or under authority with which the law clothes her to charge her husband with her maintenance and support, where the right has not been forfeited by her misconduct. Such contracts are his, not hers, unless she makes them hers.

(9) *Judgments against the wife.*—It is clear that any judgment against the wife, in contract or tort, binds her personally. Any property that she possesses will be liable to its payment—doubtless even to

her equitable separate estate, unless the instrument of grant expressly or impliedly forbids.

(10) *Suits between husband and wife.*—In investing the wife with a new status—making her solely responsible for her own liabilities, and capable of enforcing, as sole plaintiff, all her rights—the revisors of the Code were careful not to confer upon her the right to sue her husband for injury to her person or reputation, committed by him, whether before marriage or during the coverture.

The new statute contains no such saving clause. Under it, husband and wife seem to occupy the relation of strangers toward each other, so far as concerns the accrual of causes of action to one against the other, and the remedies for the enforcement of such rights. The unseemly spectacle, therefore, of a wife suing her husband for damages for a slander, or the husband haling the wife into court to answer in damages for a broom-stick assault upon him, may not be an impossibility in Virginia.

(11) *Statute of limitations.*—The new Married Woman's Act would seem to call for some modification of the general statute of limitations (Code chap. 139), which was drawn on the theory that coverture was a disability, save as to the "separate estate"—whatever this phrase may signify under the new order of things.

For the purpose of filing a bill of review, she is no longer entitled to the grace extended to infants and lunatics (Acts 1899–00, p. 770).